FILED
United States Court of Appeals
Tenth Circuit

June 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MATTHEW RAY VALENZUELA,

Defendant - Appellant.

No. 22-2113
(D.C. No. 2:17-CR-02141-WJ-1)
(D.N.M.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **KELLY**, and **MORITZ**, Circuit Judges.

Matthew Valenzuela, a federal prisoner proceeding pro se,[1] appeals the district court's order denying his compassionate-release motion. Finding no abuse of discretion in the district court's analysis, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

[1] We construe Valenzuela's pro se brief liberally, "but we do not act as his advocate." *United States v. Griffith*, 928 F.3d 855, 864 n.1 (10th Cir. 2019).

Background

In 2017, Valenzuela pleaded guilty to four counts of possessing and distributing more than 50 grams of a methamphetamine mixture, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B), and one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). For these offenses, the district court sentenced Valenzuela to 120 months in prison and four years of supervised release.

In October 2020, Valenzuela filed his first motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), as amended by the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. Valenzuela argued that the COVID-19 pandemic, his prison's purportedly negligent response to the pandemic, his positive COVID-19 diagnosis, his treatment for that diagnosis, his confinement conditions, and his medical conditions (including Hepatitis C, posttraumatic stress disorder, gastroesophageal reflux disease (GERD), and tooth infections) constituted extraordinary and compelling reasons warranting his early release. Relying on the U.S. Sentencing Commission's most recent policy statement on sentencing reductions under § 3582(c)(1)(A)(i), the district court denied Valenzuela's motion after concluding that (1) he had identified no extraordinary and compelling reason justifying his early release and (2) his armed drug-trafficking convictions, along with prior convictions for second-degree murder and battery, suggested that he posed a

danger to the community.[2] We dismissed Valenzuela's appeal from that denial after he failed to file an opening brief. *See United States v. Valenzuela*, No. 20-2170, 2021 WL 5873138, at *1 (10th Cir. June 30, 2021).

In April 2022, Valenzuela filed a second motion for compassionate release.[3] As in his first motion, he argued that extraordinary and compelling reasons justified his early release because his medical conditions, including Hepatitis C, GERD, and hypertension, exposed him to a greater risk for serious or fatal COVID-19 complications. Valenzuela also argued that he had never possessed a firearm in furtherance of a drug trafficking crime within the meaning of § 924(c)(1): In Valenzuela's view, his purportedly wrongful conviction under § 924(c)(1) further supported his request for early release. The district court concluded that Valenzuela had once again demonstrated no extraordinary and compelling reason warranting

[2] We have since held that the Sentencing Commission's most recent policy statement on sentencing reductions under § 3585(c)(1)(A)(i) does not apply to § 3582(c)(1)(A)(i) motions filed directly by defendants. *See United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021).

[3] In addition to invoking § 3582(c)(1)(A)(i) and the First Step Act, Valenzuela's motion cited 18 U.S.C. § 4205(g) and the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136, 134 Stat. 281, as statutory bases for requesting early release. On appeal, he also mentions § 404(b) of the First Step Act. None of these additional statutory bases, however, apply here. Section 4205(g) applies only to offenses that occurred before November 1, 1987, *see* 28 C.F.R. § 572.40, and the offenses Valenzuela pleaded guilty to occurred in 2017. The CARES Act expanded the Bureau of Prison's authority to place inmates in home confinement during the COVID-19 pandemic, but it did not empower the courts to grant such relief. *See United States v. Johnson*, 849 F. App'x 750, 753–54 (10th Cir. Mar. 19, 2021). And § 404(b) of the First Step Act applies only to convictions involving crack cocaine that occurred before August 3, 2010, so Valenzuela's 2017 methamphetamine convictions are plainly beyond § 404(b)'s scope. *See United States v. Mannie*, 971 F.3d 1145, 1147 (10th Cir. 2020).

early release. It therefore declined to consider the 18 U.S.C. § 3553(a) sentencing factors and denied relief.

Valenzuela now appeals.

Analysis

We review the district court's denial of Valenzuela's second motion for compassionate release for abuse of discretion. *See United States v. Hemmelgarn*, 15 F.4th 1027, 1031 (10th Cir. 2021). "A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact." *Id.* (quoting *United States v. Battle*, 706 F.3d 1313, 1317 (10th Cir. 2013)).

On appeal, Valenzuela first argues that the district court "ignored" his extraordinary and compelling reasons for early release.[4] Aplt. Br. 2. But the district court did no such thing. On the contrary, the district court acknowledged Valenzuela's asserted medical conditions, as well as Valenzuela's concerns that these conditions placed him at a greater risk for serious or fatal COVID-19 complications. But because Valenzuela had not presented any new medical evidence and had recently received a second dose of the Moderna COVID-19 vaccine, the district court remained reasonably unconvinced that Valenzuela's medical conditions and their

[4] In his opening brief, Valenzuela mentions home confinement and probation as possible forms of relief. But below, he expressly disavowed any request for home confinement and instead affirmatively represented that he sought *only* a sentence reduction. To the extent that Valenzuela has shifted course on appeal, we consider his arguments requesting home confinement or probation waived. *See United Sates v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007) (explaining that "waiver is the 'intentional relinquishment or abandonment of a known right'" (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993))).

relationship to serious or fatal COVID-19 complications constituted extraordinary and compelling reasons. *See United States v. Hald*, 8 F.4th 932, 939 (10th Cir. 2021) (noting that "access to vaccination" and "prior infection and recovery from COVID-19 would presumably weigh against a finding of extraordinary and compelling reasons"). In arguing otherwise, Valenzuela asserts that individuals who have been fully vaccinated have died at greater rates than those who were not vaccinated and that vaccinations fail to completely prevent the transmission of COVID-19 and its variants. But even if these unsupported contentions were true, they do not establish that the district court relied on an incorrect conclusion of law or clearly erroneous finding of fact. As a result, the district court was well within its discretion to conclude that no extraordinary and compelling reason supported Valenzuela's request for early release.[5] *See Hemmelgarn*, 15 F.4th at 1032.

Valenzuela next contends that the district court erred by not considering the statutory sentencing factors under § 3553(a), which he says favor release. But as the government points out, the district court was not required to address the § 3553(a) factors after concluding that Valenzuela had presented no extraordinary and

[5] In his opening brief, Valenzuela also discusses a COVID-19 outbreak that occurred at his prison in August 2022, as well as certain confinement conditions and prison procedures that, in his view, exacerbate exposure to COVID-19. But as the government observes, Valenzuela did not and could not raise his concerns arising from this August 2022 incident in his April 2022 motion for compassionate release. Nor did Valenzuela alert the district court to the specific confinement conditions and prison procedures that he raises for the first time on appeal. Adhering "to our general rule against considering issues for the first time on appeal," we decline to address Valenzuela's arguments based on factual allegations he never presented to the district court. *United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012).

compelling reason justifying his early release. To be sure, a district court may *grant* a § 3582(c)(1)(A)(i) motion if it (1) finds extraordinary and compelling reasons warranting early release, (2) concludes that early release is consistent with applicable policy statements issued by the Sentencing Commission, and (3) determines that the § 3553(a) factors favor release. *McGee*, 992 F.3d at 1042–43. But a district court may deny such a motion when any one of these three prerequisites is lacking. *Id.* at 1043; *see also Hald*, 8 F.4th at 942–43 (explaining that if it is more convenient to decide compassionate-release motion "for failure to satisfy one of the steps, [there is] no benefit in requiring [the district court] to make the useless gesture of determining whether one of the other steps is satisfied"). We therefore find no error in the district court's decision not to consider the § 3553(a) factors after finding no extraordinary and compelling reasons warranting Valenzuela's early release.

Valenzuela also challenges the district court's failure to address his argument that he never possessed a firearm in furtherance of a drug trafficking crime within the meaning of § 924(c)(1). But any error on this ground was harmless. As the government observes, we recently held in *United States v. Wesley* that a motion for compassionate release is not a proper vehicle to assert "a claim that, if true, would mean 'that the sentence was imposed in violation of the Constitution or laws of the United States.'" 60 F.4th 1277, 1288 (10th Cir. 2023) (quoting 28 U.S.C. § 2255(a)). And Valenzuela's § 924(c)(1) argument, if true, would effectively mean that this sentence was unlawfully imposed. Because Valenzuela's § 924(c)(1) argument is

foreclosed by binding circuit precedent, the district court's failure to expressly address this argument was harmless.[6]

As a final matter, we grant Valenzuela's motion to proceed in forma pauperis on appeal.

Conclusion

The district court did not abuse its discretion, so we affirm its order denying Valenzuela's second motion for compassionate release.

Entered for the Court

Nancy L. Moritz
Circuit Judge

[6] Valenzuela also makes a conclusory assertion that his prison's warden "failed to timely respond to BP-9[] and conduct a [§] 3621(e) offense review on BP-AO942 as prescribed by Program Statement P5331 [and] Program Statement 1330.18." Aplt. Br. 2. But nowhere in the argument section of his opening brief does he meaningfully develop this point. We will not "assume the role of advocate for" Valenzuela and therefore decline to consider this assertion. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).